

June 6, 2003

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E02G0436**

PETER AND VICKI SORG
Code Enforcement Appeal

Location: 19004 – 176th Avenue Northeast, Woodinville

Appellant: **Peter and Vicki Sorg**
19004 – 176th Avenue Northeast
Woodinville, WA 98072
Telephone: (425) 483-0364

King County: Department of Development and Environmental Services
represented by **Greg Sutton**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Appeal granted

EXAMINER PROCEEDINGS:

Hearing Opened:	May 20, 2003
Hearing Closed:	May 20, 2003

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 14, 2003 the King County Department of Development and Environmental Services Code Enforcement Section, issued a Notice and Order to Peter and Vicki Sorg at 19004 – 176th Avenue NE, Woodinville. The Sorgs' property was cited for excavating in a regulated Class 2 wetland without a valid grading permit. The Sorgs have filed a timely appeal of the Notice and Order.
2. The Sorgs' property is an approximately 17 acre rural residential parcel that was originally part of the Woodinville Riding Club. As such it contains extensive pasture, a residence and a farm pond that was excavated at least 40 years ago. The Sorgs purchased the property in 1988, and since that time have continued to own and graze livestock on the property.
3. The issues on appeal primarily concern the status of the Sorg farm pond. This feature appears in the 1983 King County Wetland Inventory as Big Bear Creek Wetland No. 5, encompassing 1.4 acres and described as a "palustrine aquatic bed submergent vascular" wetland. Within the 1983 inventory it is rated as Class 2 "significant". A sensitive area Notice on Title was also filed on the Sorg property in October 1997, showing the pond with a Class 2 salmonid stream at its southern outlet and a wetland to its north. The Notice on Title identifies the attached site plan as "a sketch for informational purposes only" and not the product of a survey. Based on the 1983 inventory and the Notice on Title, DDES staff has concluded that the Sorgs' pond is a Class 2 wetland subject to regulation under the King County Sensitive Areas Ordinance. Staff has made no attempt at a site-specific technical evaluation of sensitive areas on the Sorg property, and both of the staff witnesses at the public hearing for this appeal had scant first-hand knowledge of the property and its regulatory history. Accordingly, the factual testimony provided by Mr. Sorg was generally uncontested by staff and must be regarded as authoritative unless clearly contradicted by the documentary record.
4. According to Mr. Sorg, the agricultural uses on the site established by the previous owners have continued unabated during the period of the Appellants' occupancy. This includes using the pond for livestock watering, horse exercising, water-jump training, irrigation, fish raising and recreation. Regularly performed maintenance of the pond to preserve its suitability for the uses described above include periodic manual removal of milfoil and other vegetation from the pond bottom, bank restoration and repair, sediment removal by hand tools, and timber replacement and other repairs of the dam structure at the pond's southern end.
5. Both the Appellants and DDES staff have relied primarily on the interpretation of legal documents to support their positions. As a result, the record contains little explicit detail about the pond's actual wetland characteristics. It appears to have been excavated in an area underlain by gravel and sand, and in the absence of sedimentation deposits from upland sources, possesses a clean non-vegetated bottom. The pond appears to be deepest near its southern outlet end, where its depth reaches nine feet. At the pond's northern end where a small creek feeds in, it appears to be more characterized by typical wetland vegetation. Both the west and south sides of the pond feature artificially constructed, relatively steep banks, that are landscaped and devoid of wetland characteristics. The record suggests that the eastern bank of the pond was also formerly landscaped but has been allowed to revert to a more natural state. Wetland vegetation, therefore, would appear to be clearly present at the northern shallow inlet and of the pond, perhaps present along portions of the eastern boundary that have been allowed to revert to a more natural state, and absent along the landscaped and constructed western and southern pond boundaries.
6. Mr. Sorg described the hydrology of the pond as being fed by a small stream that enters at its northern end, which is augmented by surface runoff and underground springs. Below the

southern outlet dam the creek is designated Class 2 with salmonids. The actual character of the pond site as it existed prior to excavation is not described in the record.

7. Pond water elevations are controlled at the southern end by an overflow pipe and a gate valve at the bottom of the timber dam. Pictures submitted by Mr. Sorg show that the pond was drained by the previous owner in about 1987 to perform maintenance work prior to the Sorgs' purchase. During the Sorgs' ownership the pond was drained in 1992 when the gate valve became obstructed, and at that time sediment removal, bank maintenance and dam repair work were performed. Most recently the pond was drained in the fall of 2002 when the outlet pipe developed a crack and water seeped out. At that time the Sorgs discovered that the gate valve was buried under 2 to 3 feet of muck, which they removed to make repairs to the valve itself and to the outlet pipe. They also brought in a track hoe which was used to scrape sediment from the south end of the pond above the dam, and to a lesser extent to remove a thin layer of sediment at the northern inlet end.
8. The heavy buildup of sediment that in 2002 impaired the function of the overflow and gate valve systems was deposited by upstream residential development beginning in 1993. Apparently, a project to the north was required to dispose of construction runoff to the creek feeding the Sorgs' pond in order to avoid adverse impacts to Daniels Creek. Photographs submitted by the Sorgs show that in 1993 the waters of the pond were turned milky-brown from the sediment-laden runoff. Eventually the construction concluded, and much of the sediment washed through the system. But a major quantity also settled out in the pond, covering the sandy bottom with a layer of muck and encouraging the growth of milfoil. The extent of buildup did not become apparent to the Sorgs until the 2002 dewatering of the pond, at which time the sediment accumulations were exposed. This was the situation that motivated the Sorgs in September 2002 to perform a major cleanup of the pond environment, including the removal of approximately 70 cubic yards sediment from of the pond bottom.
9. During this most recent pond dewatering event, Mr. Sorg's interaction with County personnel appears to have begun on September 13, 2002, when his empty pond was visited by a County drainage investigator. As a consequence of this contact, Mr. Sorg, who is an attorney, researched County codes and decided that he did not require County permits to perform his maintenance and repair activities. He concluded, however, that he would require a hydraulic permit approval from the State Department of Fisheries. Even so, Mr. Sorg pursued his maintenance issues with Doug Dobkins of DDES, to whom he was referred by the drainage investigator. DDES responsibility for Mr. Sorg's issues was then shifted to John Kane. After a September 27, 2002 site visit by Chris Tiffany of DDES, copies of Mr. Sorg's HPA application were sent to County officials, who made no apparent effort at a timely response to the HPA expedited permit review deadlines. Mr. Sorg's resultant impression was that County staff agreed with his assessment that no County permits were required for his work so long as the standard grading permit threshold of 100 yards of excavation was not exceeded.
10. On October 9, 2002 an expedited hydraulic project approval was issued to Mr. Sorg to remove between 50 and 500 cubic yards from the pond as proposed. The HPA was issued subject to 17 conditions of approval, including a requirement that the project "may begin immediately and shall be completed by October 15, 2002." In order to complete the job before the October rains arrived placing downstream fisheries resources at risk, Mr. Sorg commenced the work on October 10th. Late on October 10th as the work was nearing completion, the site was again visited by Chris Tiffany, who expressed skepticism that such work could be performed without County permits. Mr. Sorg finished his excavation, performed the mitigations required by the HPA, and refilled the pond. On November 19, Ms Tiffany sent Mr. Sorg a letter notifying him that he was in violation of the County grading ordinance. Neither Ms. Tiffany, Mr. Dobbins, nor Mr. Kane testified at the

appeal hearing. Mr. Sutton testified on behalf of DDES that, from an environmental standpoint, staff's only objection to the work performed by Mr. Sorg was that a small quantity of sediment remains stockpiled within the 50 foot wetland buffer for the pond.

CONCLUSIONS.

1. KCC 21A.24.080 provides as follows:

“The distribution of many environmentally sensitive areas in western King County is displayed on maps in the Sensitive Areas Map Folio. Many of the wetlands are inventoried and rated and that information is published in the King County Wetlands Inventory Notebooks. ...” If there is a conflict among the maps, inventory and site specific features, the department of development and environmental services shall verify the actual presence or absence of the features defined in this title as sensitive areas. The determination may be challenged by the property owner.”

The question of whether the Sorgs farm pond is a wetland is therefore ultimately governed by the existence of wetland features on the site, not by a listing of the property within the County Wetland Inventory. In like manner, the location of wetland characteristics on the site is not determined by a Notice on Title, which simply serves to flag issues for further review and does not purport to identify the precise locations where sensitive area features are to be found. In addition, the 1997 Washington State Wetlands Identification and Delineation Manual, the use of which is mandatory for counties that plan under the Growth Management Act, distinguishes between the shallower fringes of water bodies that properly may be designated as wetlands and aquatic areas deeper than 6.6 feet, which are to be regarded normally as non-wetland deep water aquatic habitats. Simply put, the existence of a wetland on the Sorgs' property must be determined by reference to the actual presence or absence of wetland characteristics. That mere reliance on the 1983 Wetland Inventory cannot serve as an adequate investigation is evidenced by the fact that a number of larger lakes with extensive deep water habitats and heavily developed shorelines, such as Cottage Lake, Ames Lake and Lake Margaret, are included within the inventory. Clearly, inclusion of a water body in the Wetland Inventory cannot be interpreted as conclusively determining that the entire feature automatically qualifies for wetland status.

2. As noted above, the precise wetland characteristics of the Sorgs' pond are not clearly focused in the record. From what is known, it appears that the deep water portions adjacent to the outlet dam exceeds 6.6 feet in depth and would not be regulated as a wetland. Likewise, through artificial construction and on-going maintenance, the southern and western shorelines of the pond, being elevated above the water level and apparently of a sandy, gravelly composition, would have neither the soils nor vegetative characteristics necessary for wetland inclusion. On the other hand, from about the small island in the middle of the pond north to the inlet area, the waters are shallower, the vegetation more natural and wetland characteristics more likely to be present. Finally, on the east side of the pond where former landscaped and pastured areas have reverted to a natural state, intermittent wetland features are probably present. In short, the pond is probably a mixture of wetland and non-wetland features, the precise allocation of which cannot be fully determined on this record.
3. Since the current existence of at least some wetland features within the Sorg pond appear to be supported by the record, the second question to be resolved is whether these features are regulated by King County. The operative regulatory definition of a wetland is contained in KCC 21A.06.1415. Since we have previously seen that assignment of a “significant number 2” rating

by the 1983 Wetlands Inventory is inconclusive, the essential question becomes whether the wetland feature meets the basic definition contained in the section. In this regard we are compelled to consider the following provision:

“Wetlands do not include artificial features created from non-wetland areas including, but no limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm pond and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as the result of the construction of a road, street, or highway.”

It is undisputed that the Sorg pond is an artificial feature historically used as a farm pond. If so, it is exempt from County regulation if it was created from a non-wetland area. While the record is unclear as to this matter, the surrounding topography suggests that the upper end of the pond may have originally been a wetland feature, but the southern lower end most likely was not.

4. In view of this uncertainty, the matter is to be determined by reference to a burden of proof. Hearing Examiner Rule XI.B.8(a) states the general proposition that an appellant as the moving party has the burden of proof. But this general principle is modified by subparagraph (b) which provides that “in a proceeding to consider an appeal or challenge to a King County agency’s imposition of a penalty or burden on a party or on his/her property, the agency shall be required to present a *prima facie* case based upon competent evidence demonstrating that the legal standard for imposing such burden or penalty has been met.”

Once an appellant has established that an on-site wetland is an artificial feature such as a farm pond, the burden shifts to DDES to show that such artificial feature is nonetheless subject to regulation because it was created from a non-wetland area. This showing becomes part of the Department’s *prima facie* case for establishing that the legal standard for imposing a burden or penalty has been met. The Department has not made such a showing, and in its absence the uncontroverted fact that the Sorg pond is an artificial feature becomes determinative. Based the record before us, notwithstanding the existence of some wetland features, the Sorg farm pond is entitled to be regarded as a non-regulated artificial feature that is not subject to County wetland development controls.

5. Although not necessary to our decision, it is also our conclusion that, even if the Sorg pond were to be regarded as a regulated wetland, most of the maintenance activities conducted at the pond by the Sorgs would be exempt from sensitive areas development requirements under authority of KCC 21A.24.050 and .060. Removing sediment so that the cracked outlet pipe may be resealed and a gate valve repaired before the autumn rains wash sediment down into a Class 2 S stream was an emergency that supported the issuance of a hydraulics permit approval from the State, and would qualify as an emergency alteration under KCC 21A.24.050A. Similarly, the removal of sediment and milfoil by hand, restoration of the pond bank, timber replacement in the earthen dam, and soils leveling and filling performed on a regular basis would qualify under KCC 21A.24.050.B(4) as the normal and routine maintenance of the farm pond. Finally, the repair of the gate valve and the overflow pipe would also qualify for partial exemption under KCC 21A.2134.060.A(1).
6. Moreover, the contention by staff that the exclusion stated at KCC 16.82.050.J does not exempt Mr. Sorg from grading permit requirements is also without merit. The critical reference is a proviso that the minimum excavation exclusion within the grading code does not apply “if the clearing or grading is within a sensitive area as regulated in KCC Chapter 21A.24.” The interpretation offered by staff reads the word “as” out of the section. While wetlands generally

are regulated by Chapter 21A.24, the word “as” limits the grading ordinance reference to the actual manner of regulation and thus provides that the exemptions contained in KCC 21A.24.050 apply to grading permits as well. The interpretation offered by staff eliminates the word “as” from a meaningful role in the section and defeats the intent of the sensitive areas exception.

Further, to require a grading permit for the exempt activities described in KCC 21A.24.050 leads to some absurd results, particularly in view of the fact that subsections I and P of KCC 16.82.050 also contain the same operative language as subsection J. Thus, under the staff’s interpretation that a grading permit is required to obtain the benefit of the exemptions, we are forced to conclude that a farmer who mows hay, grass or a grain crop within a stream or wetland buffer under the exemption provided by KCC 21A.24.050.B.1 would need to get a clearing permit each year for such activity or otherwise would be in violation of KCC 16.82.050P. In like manner, a farmer who tills, discs, plants, seeds, harvests, and prepares soil, etc. for crops within a wetland or stream buffer pursuant to the exemption provided at 21A.24.050.B.2 would also be required to get a grading permit under 16.82.050.J for each year’s farming activity. These are nonsensical outcomes wherein the benefit of the sensitive areas exemption is completely negated by the burden of a grading permit requirement.

7. Finally, our view is also that while the existence of a hydraulic permit approval process does not automatically oust concurrent County regulation, once an emergency HPA permit process has been invoked the County needs to respond to the State comment opportunity before the permit is actually issued. Once an emergency HPA is issued without adverse comment, further County regulation of the activity inconsistent with the terms of the HPA should be considered preempted by the terms of the emergency state permit.

DECISION:

The appeal is GRANTED.

ORDERED this 6th day of June, 2003.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED via certified mail this 6th day of June, 2003 to the following:

Peter Sorg
1420 Fifth Ave. Ste. 4100
Seattle, WA 98101

TRANSMITTED this 6th day of June, 2003, to the parties and interested persons of record:

Sydney Bale
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Seattle WA 98103

Peter Sorg
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Seattle WA 98101

Peter & Vicki Sorg
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MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE MAY 20, 2003 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E02G0436.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Greg Sutton and Fred White, and John Briggs representing the Department; and Appellant Peter Sorg.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 King County DDES staff report to the Hearing Examiner dated 5/20/03
- Exhibit No. 2 Drainage investigation report by Chris Tiffany dated 9/13/02
- Exhibit No. 3 Facsimile (9/19/02) from Pete Sorg to Doug Dobkins with attachments
- Exhibit No. 4 Hydraulic project approval dated 10/09/02
- Exhibit No. 5 Sensitive Area Notice on Title for B97A0273 dated 10/20/97
- Exhibit No. 6 Letter dated 11/19/02 from Chris Tiffany to Peter Sorg
- Exhibit No. 7 Letter dated 1/18/03, response to Chris Tiffany from Pete Sorg
- Exhibit No. 8 Notice and order for E02G0436 with cover letter dated 2/14/03
- Exhibit No. 9 Letter dated 2/03/03 from Chris Tiffany to Peter Sorg
- Exhibit No. 10 Notice and statement of appeal dated 2/27/03, received 2/28/03
- Exhibit No. 11 Pre-hearing order and notice of hearing dated 4/25/03
- Exhibit No. 12 KCDDDES permit file no. 187002 – Arne Berg proposed short plat for Sorg property (withdrawn)
- Exhibit No. 13 Kroll map page showing subject property
- Exhibit No. 14 DDES GIS map showing contours and sensitive areas of property
- Exhibit No. 15 DDES GIS map showing 2000 aerial photo of property
- Exhibit No. 16 Tax parcel Situs information from KC DDES computer file, printed 5/12/03
- Exhibit No. 17 Site map with photo points and photos from 10/10/02 site visit by Chris Tiffany
- Exhibit No. 18 1990 King County Wetland Inventory Wetland Big Bear Creek 5 class 2 wetland
- Exhibit No. 19 File case notes from DDES Permits Plus computer files, printed 5/12/03
- Exhibit No. 20 Site map showing location of the property
- Exhibit No. 21 King County Code 21A.06.1415 providing a definition of wetlands
- Exhibit No. 22 King County witness list for the 5/20/03 hearing
- Exhibit No. 23 Appraisal report dated 7/23/87 with photographs (7)

- Exhibit No. 24 Short plat diagram and photographs (2) from 1987
- Exhibit No. 25 Photographs (13) of the pond, approx. 1992
- Exhibit No. 26 Photographs taken in 1993: a) detention basin, b) ditch, and c) pond
- Exhibit No. 27 Photographs (4) of pond in fall, 2002
- Exhibit No. 28 Excerpts from the WA State Wetlands Identification and Delineation Manual
- Exhibit No. 29 Fish and Wildlife Service Wetlands Classification System (2.1 through 2.5)
- Exhibit No. 30 Copies of Public Rule

SLS:cp/ms

E02G0436 RPT